

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO 82 OF 2014

*(Originating from Criminal Economic Case No 12 of 2010 of District Court of Bunda
at Bunda)*

BERNARD MATUTU APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

21st October & 29th November, 2022

Kahyoza, J:

The district court of Bunda convicted **Bernard Matutu** (the appellant) after a full trial with two offences; **one**, unlawful possession of government trophies; and **two**, failure to report possession of government trophies. The trial court sentenced the appellant to a custodial sentence of twenty years for the offence in the first count and three years for the offence in the second count. It ordered the sentence to run concurrently. The trial court sentenced the appellant *in absentia* as he jumped bail immediately after the prosecution closed its case. The appellant was arrested and sent to prison to serve his sentence.

Aggrieved, the appellant appealed to this Court contending that the trial court erred in law to try an economic case without the DPP's consent and certificate, to convict him on the evidence of Pw1 and Pw2

who had common interest or say in the absence of an independent witness, that the trial court failed to draw adverse inference from the prosecution's failure to call ten cell-leader and that he was not given a chance to present his defence.

This is the first appellate Court; thus, tasked with a duty to rehear and re-evaluate the evidence together with a duty to consider the appellant's grounds of appeal. (**Alex Kapinga v. R.**, Criminal Appeal No. 252 of 2005 (CAT unreported). The appellant's appeal spins around the following issues: -

1. Did the court convict the appellant without consent and certificate from the D.P.P.?
2. Was there a need for an independent witness?
3. Did the trial court deny the appellant to make his defence?

A brief background is that; the prosecution arraigned the appellant with two offences; **one**, unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5/2009 (the **WLCA**) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E. 2002] (the **EOCCA**); **two**, failure to report possession of government trophies contrary to section 87(1) and (2) of the Wildlife

Conservation Act, No. 5/2009. After the prosecution closed its case, the appellant jumped bail. The trial court found the appellant guilty, convicted and sentenced him *in absentia*. Upon his arrest, the police surrendered the appellant to prison where he started serving his sentence.

To prove the appellant guilty, the prosecution summoned three witnesses and tendered two exhibits. The prosecution witnesses, Venance Elias (**Pw1**) and Bernard Chuma (**Pw3**) deposed that on the 14th August, 2010 at about **13.00hrs** were on routine patrol with another park ranger Isack Peter and a police officer at Sanzate village. They got information that there was person selling dried wild meat. They went to the house. On reaching the place one person escaped. Bernard Chuma (**Pw3**) run after that person whom he later identified as the appellant but he could not arrest him. They entered the premises suspected to sell wild meat. They found one woman who identified herself as Tina Matutu, the appellant's wife. They found a ten-cell leader called Waryoba and searched the house. They obtained ten dried pieces of Thomson Gazelle and eight pieces of wildebeest. They took the Tina Matutu to police.

Proches Rongoma (**Pw2**) identified and valued the trophies. He prepared and tendered a trophy valuation certificate as exhibit P. 2. He further prepared an inventory and called the magistrate who ordered the disposal of the exhibits. He tendered the inventory as exhibit P. 1.

The appellant did not defend himself as he jumped bail immediately after the prosecution closed its case. Unfortunately, upon his apprehension, the police did not take him to court to account why he was absent. The police was required to take him to court so that the court may take action as provided under section 226(2) of the Criminal Procedure Act, [Cap.20 R.E. 2002, now 2022]

Did the trial court convict the appellant without consent and certificate from the D.P.P.?

The appellant complained that the trial court erred to convict him without consent and certificate from the DPP. The appellant did not elaborate his complaint.

The respondent's Principal State Attorney, Ms. Tibilegwa refuted the appellant's complaint that the prosecution did not tender a consent and certificate from the DPP. She submitted the DPP issued consent and certificate to the trial court and the prosecution did tender them.

Indeed, the appellant's complaint that the trial court tried an economic case without a consent and certificate from the DPP was baseless. The record shows that the prosecution tendered a consent and certificate conferring jurisdiction to the trial court to try economic case from the DPP on 29.9.2010. However, upon scrutiny of the certificate, I found that the D.P.P issued its certificate under section 12(3) of the **EOCCA**. The law provides in no uncertain terms that economic offences are triable by the High Court. If the D.P.P wishes a subordinate court to try an economic offence, he has to issue certificate of transfer of a case under section 12(3) or 12(4) of the **EOCCA**. If the accused person is charged with a combination of both economic and non-economic offences, the DPP issues a certificate under section 12 (4) of the EOCCA, whereas, when the accused is charged with economic offence only, the DPP should issue a certificate under subsection (3) of section 12 of **EOCCA**.

The appellant was charged with a combination of both economic and non-economic offences. Nonetheless, the DPP issued a certificate of transfer under subsection (3) of section 12 of the **EOCCA**. The Court of Appeal in **Kaunguza Machemba vs. The Republic**, Criminal Appeal No.1578 of 2013 (CAT unreported), held that the appropriate section under which the certificate ought to be made was section 12(4) of the

EOCCA, which caters for both economic and non-economic offences. I therefore, find that the certificate conferring jurisdiction to the trial court to try economic case is defective. Since the certificate conferring jurisdiction to the trial court to try economic case was defective, the trial court was not conferred with jurisdiction to conduct the trial against the appellant. Consequently, there could not have been any valid proceedings before the trial court resulting in the conviction and sentence handed out to the appellant, I allow the first ground of appeal that the trial court tried the appellant without jurisdiction. The proceedings and the resultant conviction and sentence were all a nullity.

As this ground suffices to dispose of the appeal, I will not proceed to determine the remaining grounds of appeal as it will be an academism exercise. I will proceed to consider whether to order a retrial. In **Fatehali Manji v R** [1966] E.A. 341 the then Court of Appeal of East Africa laid down the principle governing retrial. It stated-

"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be

ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."

I had a cursory review of the prosecution evidence, to say the least it is wanting. It cannot be the bases of ordering retrial. The prosecution evidence was that the appellant was found in possession of the government trophy and tendered through Proches Rongoma (**Pw2**) an inventory, Exh.P.1. The persecution tendered the inventory to prove that the appellant was found in possession of dried pieces of wild meat. The inventory does not bear the appellant's signature or the appellant's wife's signature. The prosecution evidence was that they searched the appellant's house in the presence of the appellant's wife as the appellant escape. They arrested the appellant's wife and took her to police with the meat suspected to be of wild animal's meat. Proches Rongoma (**Pw2**) prepared the inventory and sought the magistrate's order to dispose the exhibit without involving the appellant or his wife who was in police hands at that moment.

The magistrate ordered the police to dispose of the trophy without according the appellant or the appellant's wife who was the appellant's co-accused person, an opportunity to air opinion or comment. The appellant or his wife was required to comment and his or his wife's

comment to be recorded in the inventory, before the magistrate ordered the disposal. The Court of Appeal held, in **Mohamed Juma @ Mpakama** Criminal Appeal No. 385/2017 (CAT Unreported) before disposing exhibits under paragraph 25 of PGO No. 229, that the accused person must be present and the magistrate should hear him. It stated-

*"This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out of police bail) **to be present before the magistrate and be heard.**"*

I find that the trial court did improperly admitted the inventory, exhibit P.1, as the magistrate did not hear the appellant or the appellant's wife who the first suspect, before he ordered the trophy to be disposed of. Subsequently, I expunge the exhibit from the court's record. Once that exhibit is expunged, there remains no evidence to prove that the appellant was in possession of government trophy. To order retrial would not be justified as that would assist the prosecution to fill in the gap in its case. Worse still, even if the trial is ordered, the prosecution will not be able to prove the offence of being found in possession of the government trophy as the police destroyed the physical exhibit and the inventory was prepared in violation of the law as shown above.

It is also on record that the appellant's homestead was searched and dried meat suspected to be of wild animal discovered. The evidence showed that the appellant was searched in the presence of park rangers, Venance Elias (**Pw1**), Bernard Chuma (**Pw3**), one police officer and a ten-cell leader. The prosecution summoned only two park rangers to prove that the appellant's home was searched and wild meat obtained. It did not call an independent witness to support the allegation. It is trite law that no search of premises of an accused person would be valid without an independent witness to witness and sign on the seizure certificate or the receipt acknowledging seizure. See the case of Samweli **Kibundali Mgaya** v. **R.**, Criminal Appeal No. 180/2020 (CAT Unreported) where the Court of Appeal held that-

*"Deducing from the quoted provisions of law, **no search of a premises shall be effected without; one, search warrant; two, the presence of the owner of the premises, occupier or his near relative at the search premises; three, the presence of an independent witness who is required to sign to verify his presence; and four, issuance of a receipt acknowledging seizure of property.**"*

The prosecution not only did they not call the alleged independent witness to testify, but also did not tender a receipt to acknowledge seizure of the property. Given the evidence on record, it would be of no

one's interest to order a retrial as the prosecution's evidence is wanting. The prosecution will not prove the appellant guilty even if given another chance to do. If, I order the appellant to be re-tried it will be to torture him as no justice will be attained. The appellant has been in custody since 2014 today. He has had enough experience in being in prison, so there no reason give him another ordeal.

Eventually, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant to be released forthwith, unless otherwise held for any other lawful cause.

It is ordered accordingly.



A handwritten signature in black ink, appearing to read "J. R. Kahyoza", written over a horizontal line.

**J. R. Kahyoza,
Judge
29/11/2022**

Court: Judgment delivered in the absence of the parties. They could not link to the virtual court. Copies sent to the Ms. Jackline, bench clerk for dispatch.

A handwritten signature in black ink, appearing to read "J. R. Kahyoza", written over a horizontal line.

**J. R. Kahyoza
JUDGE
29/11/2022**